

**Letter of Findings Number: 04-20110583**  
**Use Tax**  
**For Tax Years 2008-10**

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**ISSUES**

**I. Sales Tax—Imposition.**

**Authority:** Galligan v. Indiana Dep't of State Revenue, 825 N.E.2d 467 (Ind. Tax Ct. 2005); IC § 6-2.5-1-1; IC § 6-2.5-1-5; IC § 6-2.5-2-1; IC § 6-2.5-3-7; IC § 6-2.5-4-1; IC § 6-2.5-8-8; [45 IAC 2.2-8-12](#); IC § 6-8.1-5-1.

Taxpayer protests the imposition of sales tax on certain transactions.

**II. Use Tax—Imposition.**

**Authority:** IC § 6-2.5-2-1; IC § 6-2.5-3-1; IC § 6-2.5-3-2; IC § 6-2.5-4-10; IC § 6-8.1-5-1; [45 IAC 2.2-1-1](#); [45 IAC 2.2-3-4](#); [45 IAC 2.2-4-27](#); [45 IAC 2.2-4-28](#).

Taxpayer protests the imposition of use tax on certain transactions.

**STATEMENT OF FACTS**

Taxpayer is an Indiana business. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had not collected sales tax as a retail merchant on some taxable transactions during the audit years of 2008, 2009, and 2010. Also, the Department determined that Taxpayer had not paid sales tax on some purchases of tangible personal property which Taxpayer used in its own business. The Department therefore issued proposed assessments for sales tax, use tax, and interest for those years. Taxpayer protests the imposition of sales tax and use tax on certain of the transactions included as subject to either sales or use tax. An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as required.

**I. Sales Tax—Imposition.**

**DISCUSSION**

Taxpayer protests the imposition of sales tax on some of the transactions which the Department determined were taxable. The Department based its determination on the grounds that Taxpayer sold tangible personal property and did not collect and remit sales tax on those transactions. Taxpayer protests that it was not required to collect and remit sales tax on two types of transactions. First, Taxpayer states that it had exemption certificates covering two of its customers, thereby relieving it of the duty to collect sales tax. Second, Taxpayer states that several transactions which the Department included as taxable were only delivery charges and not the sale of tangible personal property. The Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c).

The sales tax is imposed under IC § 6-2.5-2-1, which provides:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

(Emphasis added).

Therefore, Taxpayer as a retail merchant had the duty to collect and remit sales tax on retail transactions it made with its customers. However, there are several exemptions from the sales tax and Taxpayer argues that there were two types of transactions upon which the Department imposed sales tax which qualified for exemption.

The first category of transactions which Taxpayer argues were exempt from sales tax were those with two of its customers for whom Taxpayer states that it had exemption certificates. The two customers are related companies ("Customer 1" and "Customer 2") which are both wholly owned by a third company ("Parent"). Taxpayer argues that Parent provided an exemption certificate which covered purchases by both Customer 1 and Customer 2.

The first relevant statute is IC § 6-2.5-3-7, which states:

- (a) A person who acquires tangible personal property from a retail merchant for delivery in Indiana is presumed to have acquired the property for storage, use, or consumption in Indiana, unless the person or the retail merchant can produce evidence to rebut that presumption.

- (b) A retail merchant is not required to produce evidence of nontaxability under subsection (a) if the retail merchant receives from the person who acquired the property an exemption certificate which certifies, in the form prescribed by the department, that the acquisition is exempt from the use tax.

(Emphasis added).

Next, IC § 6-2.5-8-8 provides:

(a) A person, authorized under subsection (b), who makes a purchase in a transaction which is exempt from the state gross retail and use taxes, may issue an exemption certificate to the seller instead of paying the tax. The person shall issue the certificate on forms and in the manner prescribed by the department. A seller accepting a proper exemption certificate under this section has no duty to collect or remit the state gross retail or use tax on that purchase.

(b) The following are the only persons authorized to issue exemption certificates:

(1) retail merchants, wholesalers, and manufacturers, who are registered with the department under this chapter;

(2) organizations which are exempt from the state gross retail tax under [IC 6-2.5-5-21](#), [IC 6-2.5-5-25](#), or [IC 6-2.5-5-26](#) and which are registered with the department under this chapter; and

(3) other persons who are exempt from the state gross retail tax with respect to any part of their purchases.

(c) The department may also allow a person to issue a blanket exemption certificate to cover exempt purchases over a stated period of time. The department may impose conditions on the use of the blanket exemption certificate and restrictions on the kind or category of purchases that are exempt.

(Emphasis added).

Also, [45 IAC 2.2-8-12](#) explains:

(a) Exemption certificates may be issued [sic.] only by purchasers authorized to issue such certificates by the Department of Revenue. Retail merchants, manufacturers, wholesalers and others who must register with the Department of Revenue and who qualify to purchase exempt from tax under this Act [[IC 6-2.5](#)] may issue exemption certificates with respect to exempt transactions. All persons or entities not required to register with the Department as retail merchants, manufacturers, or wholesalers, and who are exempt under this Act [[IC 6-2.5](#)] with respect to all or a portion of their purchases are authorized to issue exemption certificates with respect to exempt transaction provided an exemption number has been assigned by the Department of Revenue, or provided that the Department of Revenue has specifically provided a form and manner for issuing exemption certificates without the need for assigning an exemption number.

(b) Retail merchants are required to collect the sales and use tax on each sale which constitutes a retail transaction unless the merchant can establish that the item purchased will be used by the purchaser for an exempt purpose.

(c) All retail sales of tangible personal property for delivery in the state of Indiana shall be presumed to be subject to sales or use tax until the contrary is established. The burden of proof is on the buyer and also on the seller unless the seller receives an exemption certificate.

(d) Unless the seller receives a properly completed exemption certificate the merchant must prove that sales tax was collected and remitted to the state or that the purchaser actually used the item for an exempt purpose. It is, therefore, very important to the seller to obtain an exemption certificate in order to avoid the necessity for such proof. The mere filing of a Registered Retail Merchant Certificate number is not sufficient to relieve the seller of the responsibility to collect the sales tax or prove exempt use by the buyer.

(e) No exemption certificates are required for sales in interstate commerce, however, proper records must be maintained to substantiate such sales.

(f) An exemption certificate issued by a purchaser shall not be valid unless it is executed in the prescribed and approved form and unless all information requested on such form is completed.

(g) An exemption certificate or other evidence supporting an exempt sale must be maintained by the seller for at least three (3) years after the due date of the tax return upon which such exempt transaction is reported.

(h) Exemption certificates may be reproduced provided no change is made in the wording or content.

(Emphasis added).

Therefore, a retail merchant must collect and remit sales tax unless it receives a valid exemption certificate with all information on the form is completed. Taxpayer provided a copy of the exemption certificate which it believes establishes that sales to Customer 1 and Customer 2 were exempt from sales tax.

A review of the exemption certificate shows that it lists the name and taxpayer identification number ("TID") of Customer 1. Customer 2 is not listed on the form. As provided by [45 IAC 2.2-8-12\(f\)](#), an exemption certificate issued by a purchaser shall not be valid unless it is executed in the prescribed and approved form and unless all information requested on such form is completed. While the exemption certificate provided by Taxpayer is valid for sales to Customer 1, it is not valid for sales to Customer 2. Common ownership is not a valid reason to apply one Taxpayer's exemption certificate to another taxpayer.

The second category under protest concerns amounts which Taxpayer protests are charges for delivery only. Taxpayer believes that these amounts are not subject to sales tax and that they should be removed from the Department's calculations of sales tax due. Taxpayer provided invoices in support of its position that the Department included delivery charges as amounts subject to sales tax. The first relevant statute is IC § 6-2.5-1-1, which states:

(a) Except as provided in subsection (b), "unitary transaction" includes all items of personal property and services which are furnished under a single order or agreement and for which a total combined charge or price is calculated.

(b) "Unitary transaction" as it applies to the furnishing of public utility commodities or services means the public utility commodities and services which are invoiced in a single bill or statement for payment by the consumer.

(Emphasis added).

Also of relevance is IC § 6-2.5-1-5(a), which provides:

Except as provided in subsection (b), "gross retail income" means the total amount of consideration, including cash, credit, property, and services, for which tangible personal property is sold, leased, or rented, valued in money, whether received in money or otherwise, without any deduction for:

- (1) the seller's cost of the property sold;
- (2) the cost of materials used, labor or service cost, interest, losses, all costs of transportation to the seller, all taxes imposed on the seller, and any other expense of the seller;
- (3) charges by the seller for any services necessary to complete the sale, other than delivery and installation charges;
- (4) delivery charges; or
- (5) consideration received by the seller from a third party if:
  - (A) the seller actually receives consideration from a party other than the purchaser and the consideration is directly related to a price reduction or discount on the sale;
  - (B) the seller has an obligation to pass the price reduction or discount through to the purchaser;
  - (C) the amount of the consideration attributable to the sale is fixed and determinable by the seller at the time of the sale of the item to the purchaser; and
  - (D) the price reduction or discount is identified as a third party price reduction or discount on the invoice received by the purchaser or on a coupon, certificate, or other documentation presented by the purchaser. For purposes of subdivision (4), delivery charges are charges by the seller for preparation and delivery of the property to a location designated by the purchaser of property, including but not limited to transportation, shipping, postage, handling, crating, and packing.

(Emphasis added).

The next relevant statute is IC § 6-2.5-4-1, which states:

(a) A person is a retail merchant making a retail transaction when he engages in selling at retail.

(b) A person is engaged in selling at retail when, in the ordinary course of his regularly conducted trade or business, he:

- (1) acquires tangible personal property for the purpose of resale; and
- (2) transfers that property to another person for consideration.

(c) For purposes of determining what constitutes selling at retail, it does not matter whether:

- (1) the property is transferred in the same form as when it was acquired;
- (2) the property is transferred alone or in conjunction with other property or services; or
- (3) the property is transferred conditionally or otherwise.

(d) Notwithstanding subsection (b), a person is not selling at retail if he is making a wholesale sale as described in section 2 of this chapter.

(e) The gross retail income received from selling at retail is only taxable under this article to the extent that the income represents:

- (1) the price of the property transferred, without the rendition of any service; and
- (2) except as provided in subsection (g), any bona fide charges which are made for preparation, fabrication, alteration, modification, finishing, completion, delivery, or other service performed in respect to the property transferred before its transfer and which are separately stated on the transferor's records.

For purposes of this subsection, a transfer is considered to have occurred after delivery of the property to the purchaser.

(f) Notwithstanding subsection (e):

- (1) in the case of retail sales of gasoline (as defined in [IC 6-6-1.1-103](#)) and special fuel (as defined in [IC 6-6-2.5-22](#)), the gross retail income received from selling at retail is the total sales price of the gasoline or special fuel minus the part of that price attributable to tax imposed under [IC 6-6-1.1](#), [IC 6-6-2.5](#), or Section 4041(a) or Section 4081 of the Internal Revenue Code; and
- (2) in the case of retail sales of cigarettes (as defined in [IC 6-7-1-2](#)), the gross retail income received from selling at retail is the total sales price of the cigarettes including the tax imposed under [IC 6-7-1](#).

(g) Gross retail income does not include income that represents charges for serving or delivering food and food ingredients furnished, prepared, or served for consumption at a location, or on equipment, provided by the retail merchant. However, the exclusion under this subsection only applies if the charges for the serving or delivery are stated separately from the price of the food and food ingredients when the purchaser pays the charges.

(Emphasis added).

In *Galligan v. Indiana Dep't of State Revenue*, 825 N.E.2d 467, 480-1 (Ind. Tax Ct. 2005), the Indiana Tax Court wrote:

As mentioned earlier, the provision of services is, generally, not taxable. As a practical matter, however, "mixed transactions" often occur where tangible personal property is sold in order to complete a service contract, or where services are provided in order to complete the sale of tangible personal property. For these mixed transactions, distinguishing the taxable sale of property from the non-taxable sale of services is often difficult. Accordingly, the legislature has set forth several parameters for imposing tax on these transactions. First, taxable property does not escape taxation merely because it is transferred in conjunction with the provision of non-taxable services. Ind. Code Ann. § 6-2.5-4-1(c)(2) (West 1994) (amended 2004). Second, services, generally outside the scope of taxation, are subject to tax to the extent the income represents "any bona fide charges which are made for preparation, fabrication, alteration, modification, finishing, completion, delivery, or other service performed in respect to the property transferred before its transfer and which are separately stated on the transferor's records." A.I.C. § 6-2.5-4-1(e)(2) (emphasis added). Finally, the legislature imposes tax on services that are provided in a retail unitary transaction, "a unitary transaction that is also a retail transaction." Ind. Code Ann. § 6-2.5-1-2(b) (West 1994). A unitary transaction is one which "includes all items of personal property and services which are furnished under a single order or agreement and for which a total combined charge or price is calculated." Ind. Code Ann. § 6-2.5-1-1(a) (West 1994). (Emphasis in original).

Therefore, delivery charges which are included under a single order or agreement and for which a total combined charge or price is calculated are part of a unitary transaction, under IC § 6-2.5-1-1(a). Under IC § 6-2.5-4-1(e), the gross retail income received from selling at retail is only taxable under this article to the extent that the income represents the price of the property transferred, without the rendition of any service plus any bona fide charges which are made for preparation, fabrication, alteration, modification, finishing, completion, delivery, or other service performed in respect to the property transferred before its transfer and which are separately stated on the transferor's records. Also, for purposes of IC § 6-2.5-4-1(e), a transfer is considered to have occurred after delivery of the property to the purchaser.

A review of the invoices provided by Taxpayer shows that one invoice (Invoice 2804, dated March 19, 2010) included charges for delivery only. The other invoices show an amount charged for tangible personal property and an amount charged for delivery with a total amount charged for the entire transaction. This plainly falls within the definition of a unitary transaction as provided by IC § 6-2.5-1-1 and the entire amount of the transaction is subject to sales tax as provided by IC § 6-2.5-4-1(e) and the court's decision in Galligan.

In conclusion, Taxpayer has provided a valid exemption certificate for Customer 1 and has not provided a valid exemption certificate for Customer 2. Also, Taxpayer has provided one invoice which showed delivery charges only without charges for tangible personal property. The other invoices show charges for tangible personal property and delivery charges include in a total combined charge. The entire amount charged on those invoices is subject to sales tax. Therefore, the Department will conduct a supplemental audit and will remove sales to Customer 1 and the amount charged on Invoice 2804 from the amount of taxable sales upon which Taxpayer should have charged and remitted sales tax as a retail merchant.

#### **FINDING**

Taxpayer's protest is sustained in part and denied in part, as described above.

## **II. Use Tax—Imposition.**

### **DISCUSSION**

Taxpayer protests the imposition of use tax on purchases it made during the tax years 2008, 2009, and 2010. The Department imposed use tax on some purchases Taxpayer made during those years on the basis that Taxpayer did not pay sales tax at the time of purchase. Taxpayer protests that some of the purchases were for its inventory and that transactions listed as equipment rentals were actually employee reimbursements. The Department notes that, as explained in Issue I above, the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c).

The sales tax is imposed by IC § 6-2.5-2-1, which states:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

The use tax is imposed under IC § 6-2.5-3-2(a), which states:

An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

Also, IC § 6-2.5-3-1 provides:

For purposes of this chapter:

- (a) "Use" means the exercise of any right or power of ownership over tangible personal property.
- (b) "Storage" means the keeping or retention of tangible personal property in Indiana for any purpose except the subsequent use of that property solely outside Indiana.

(c) "A retail merchant engaged in business in Indiana" includes any retail merchant who makes retail transactions in which a person acquires personal property or services for use, storage, or consumption in Indiana and who:

- (1) maintains an office, place of distribution, sales location, sample location, warehouse, storage place, or other place of business which is located in Indiana and which the retail merchant maintains, occupies, or uses, either permanently or temporarily, either directly or indirectly, and either by the retail merchant or through a representative, agent, or subsidiary;
- (2) maintains a representative, agent, salesman, canvasser, or solicitor who, while operating in Indiana under the authority of and on behalf of the retail merchant or a subsidiary of the retail merchant, sells, delivers, installs, repairs, assembles, sets up, accepts returns of, bills, invoices, or takes orders for sales of tangible personal property or services to be used, stored, or consumed in Indiana;
- (3) is otherwise required to register as a retail merchant under [IC 6-2.5-8-1](#); or
- (4) may be required by the state to collect tax under this article to the extent allowed under the Constitution of the United States and federal law.

(d) Notwithstanding any other provision of this section, tangible or intangible property that is:

- (1) owned or leased by a person that has contracted with a commercial printer for printing; and
- (2) located at the premises of the commercial printer;

shall not be considered to be, or to create, an office, a place of distribution, a sales location, a sample location, a warehouse, a storage place, or other place of business maintained, occupied, or used in any way by the person. A commercial printer with which a person has contracted for printing shall not be considered to be in any way a representative, an agent, a salesman, a canvasser, or a solicitor for the person.

Also, [45 IAC 2.2-3-4](#) provides:

Tangible personal property, purchased in Indiana, or elsewhere in a retail transaction, and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax for such property, unless the Indiana state gross retail tax has been collected at the point of purchase.

Therefore, when tangible personal property is acquired in a retail transaction and is stored, used, or consumed in Indiana, Indiana use tax is due if sales tax has not been paid at the point of purchase. In this case, the Department determined that Taxpayer had acquired tangible personal property in retail transactions and used that property in Indiana without paying sales tax at the point of purchase. The Department therefore issued proposed assessments for use tax, as provided by [45 IAC 2.2-3-4](#).

Taxpayer protests that the sales in question were casual sales and were not subject to use tax. [45 IAC 2.2-1-1](#)(d) provides:

The Indiana gross retail tax is not imposed on gross receipts from casual sales except for gross receipts from casual sales of motor vehicles and sales of rental property. A casual sale is an isolated or occasional sale by the owner of tangible personal property purchased or otherwise acquired for his use or consumption, where he is not regularly engaged in the business of making such sales.

[45 IAC 2.2-4-28](#) states:

(a) The sale by a person of tangible personal property which is rented or leased in the regular course of such person's rental or leasing business shall be subject to the gross retail tax and use tax.

(b) In general, casual sales of tangible personal property are exempt from tax. This regulation [[45 IAC 2.2](#)] imposes a tax on such sales of tangible personal property subsequent to such property's use as rental property. The state gross retail tax shall apply to the gross receipts from the sale of any tangible personal property which had been rented or leased to others in the regular course of the seller's renting or leasing business.

[45 IAC 2.2-4-27](#) states:

(a) In general, the gross receipts from renting or leasing tangible personal property are taxable. This regulation [[45 IAC 2.2](#)] only exempts from tax those transactions which would have been exempt in an equivalent sales transaction.

(b) Every person engaged in the business of the rental or leasing of tangible personal property, other than a public utility, shall be deemed to be a retail merchant in respect thereto and such rental or leasing transaction shall constitute a retail transaction subject to the state gross retail tax on the amount of the actual receipts from such rental or leasing.

(c) In general, the gross receipts from renting or leasing tangible personal property are subject to tax. The rental or leasing of tangible personal property constitutes a retail transaction, and every lessor is a retail merchant with respect to such transactions. The lessor must collect and remit the gross retail tax or use tax on the amount of actual receipts as agent for the state of Indiana. The tax is borne by the lessee, except when the lessee is otherwise exempt from taxation.

(d) The rental or leasing of tangible personal property, by whatever mean effected and irrespective of the terms employed by the parties to describe such transaction, is taxable.

- (1) Amount of actual receipts. The amount of actual receipts means the gross receipts from the rental or leasing of tangible personal property without any deduction whatever for expenses or costs incidental to



the conduct of the business. The gross receipts include any consideration received from the exercise of an option contained in the rental of lease agreement; royalties paid, or agreed to be paid, either on a lump sum or other production basis, for use of tangible personal property; and any receipts held by the lessor which may at the time of their receipt or some future time be applied by the lessor as rentals.

(2) Rental or lease period. For purposes of the imposition of the gross retail tax or use tax on rental or leasing transactions, each period for which a rental is payable shall be considered a complete transaction. In the case of a weekly rate, each week shall be considered a complete transaction. In the case of a continuing lease or contract, with or without a definite expiration date, where rental payments are to be made monthly or on some other periodic basis, each payment period shall be considered a completed transaction.

(3) Renting or leasing property with an operator:

(A) The renting or leasing of tangible personal property, together with the services of an operator shall be subject to the tax when control of the property is exercised by the lessee. Control is exercised when the lessee has exclusive use of the property, and the lessee has the right to direct the manner of the use of the property. If these conditions are present, control is deemed to be exercised even though it is not actually exercised.

(B) The rental of tangible personal property together with an operator as part of a contract to perform a specific job in a manner to be determined by the owner of the property or the operator shall be considered the performance of a service rather than a rental or lease provided the lessee cannot exercise control over such property and operator.

(C) When tangible personal property is rented or leased together with the service of an operator, the gross retail tax or use tax is imposed on the property rentals. The tax is not imposed upon the charges for the operator's services, provided such charges are separately stated on the invoice rendered by the lessor to the lessee.

(D) Notwithstanding any other provision of this regulation [\[45 IAC 2.2\]](#) any lessee leasing or renting a vehicle(s) from any lessor, including an individual lessor, with or without operators, driver(s), or even if the operator (driver) himself is the lessor, regardless of control exercised, shall not be subject to the gross retail tax or use tax, if the leased or rented vehicle(s) are directly used in the rendering of public transportation.

(4) Supplies furnished with leased property. A person engaged in the business of renting or leasing tangible personal property is considered the consumer of supplies, fuels, and other consumables which are furnished with the property which is rented or leased.

(Emphasis added).

Also, IC § 6-2.5-4-10 provides:

(a) A person, other than a public utility, is a retail merchant making a retail transaction when he rents or leases tangible personal property to another person other than for subrent or sublease.

(b) A person is a retail merchant making a retail transaction when the person sells any tangible personal property which has been rented or leased in the regular course of the person's rental or leasing business.

(c) Notwithstanding subsection (a), a person is not a retail merchant making a retail transaction when the person rents or leases motion picture film, audio tape, or video tape to another person. However, this exclusion only applies if:

(1) the person who pays to rent or lease the film charges admission to those who view the film; or

(2) the person who pays to rent or lease the film or tape broadcasts the film or tape for home viewing or listening.

(Emphasis added).

In the first category of protested items, Taxpayer states that the backhoe was not rented or leased from a retail merchant, but rather was used by Taxpayer's employee ("Employee") and the amounts listed as rentals in Taxpayer's records were actually reimbursements to the employee for the use of the backhoe.

The Department notes that Taxpayer has not provided any documentation supporting its position that the payments were reimbursements and not rentals. Also, Taxpayer has not referred to any Indiana sales or use tax statute, regulation, or court case which explains what difference it would make even if the payments were reimbursements. The fact remains that Taxpayer entered into an arrangement with its customers to perform activities which required the use of a backhoe, Taxpayer used the backhoe owned by Employee, and paid Employee for that use. This is a rental of tangible personal property.

As provided by IC § 6-2.5-3-2(a), the use tax is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction. IC § 6-2.5-4-10(a) provides that a person is a retail merchant making a retail transaction when he rents or leases tangible personal property to another person other than for subrent or sublease. As provided by [45 IAC 2.2-1-1\(d\)](#) a casual sale is an isolated or occasional sale by the owner of tangible personal property purchased or otherwise acquired for his use or consumption, where he is not regularly engaged in the business of making such sales. In this case, Taxpayer rented the backhoe between thirteen and twenty times per year during the audit period. These are not isolated or

occasional transactions. These are regular rentals of tangible personal property.

Therefore, Employee was acting as a retail merchant making a retail transaction when he rented the backhoe to Taxpayer. Since the backhoe was rented in a retail transaction and since Taxpayer used the backhoe in Indiana, Indiana use tax is properly due on the rental of the backhoe. Taxpayer has not met the burden of proving the proposed use tax on the rental of the backhoe incorrect, as required by IC § 6-8.1-5-1(c).

The second category under protest concerns items which Taxpayer states were purchased as inventory. Taxpayer explains that it purchased items such as gravel, sand, and rocks to put into inventory which it would later sell to its customers. Taxpayer provided receipts for the purchases of some of the gravel and sand, along with pictures of the inventory piles themselves in support of its position.

After review of these materials, the Department cannot agree with Taxpayer's protest. The receipts show that sand and gravel were purchased, but they alone do not track where the sand and gravel went or how they were used. The pictures show that there are piles of sand, gravel, and rocks, but they alone do not establish that the sand, gravel, and rocks in those piles were purchased in the transactions at issue. Taxpayer has not met the burden of proving the proposed assessments wrong, as required by IC § 6-8.1-5-1(c).

In conclusion, Taxpayer rented the backhoe from Employee and paid Employee for that rental. Indiana use tax is therefore due on those rentals. Taxpayer did purchase sand, gravel, rocks, but was unable to establish the disposition of the sand, gravel, and rocks purchased during the audit period. Taxpayer has not met the burden of proving the proposed use tax assessments wrong, as required by IC § 6-8.1-5-1(c).

#### **FINDING**

Taxpayer's protest is denied.

#### **SUMMARY**

Taxpayer is partially sustained on Issue I regarding sales tax on sales to Customer 1 and Invoice 2804. Taxpayer is denied in all other regards on Issue I. Taxpayer is denied in total on Issue II regarding use tax.

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